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How to Define Attainable Uses?

By definition/default, an attainable use is any designated use (or even potential use?) other than those that can be proven to be non-attainable.

The six 40 CFR 131.10(g) factors have negative-proof burdens:

Natural pollution/conditions prevent the attainment

Not feasible to restore/operate hydromods

Human conditions cannot be remedied

Would cause more environmental damage to correct

Physical conditions preclude attainment

Would cause economic/social hardship

So the real question is: How to prove a negative?

Most of the key terms and phrases in the 6 factors have never been defined in statute, regulation or policy (state or federal):

Bad news: Makes proving the negative more challenging

Good news: Opportunity for Idaho to define what is appropriate for Idaho

Key terms/phrases:

Not feasible

Economic impact

Technically infeasible (today or when the Jetsons is reality?)

Time frame (foreseeable future, 20 years, longer?)

Water rights and physical infrastructure, fully functional and productive storage and hydropower projects and irrigation systems

Is a UAA harmful? Easy to go to higher level of protection (no UAA needed)

“Cannot be remedied” and “not feasible to restore”

Assume some alteration of “natural conditions”

What about man-made irrigation conveyances?

Weight of evidence approach

Natural conditions

Not applicable to hydromodified systems, reservoirs

How do you find a surrogate or reference reservoir?

Would cause more environmental harm

How to evaluate harm across different environmental media (air vs. water, flat-water vs. riverine recreation, bass fishing vs. trout fishing, etc.)

How do recreational designations encourage/discourage unsafe activities?

Would cause substantial and widespread economic and social impact

What is geographic extent?

1995 “Interim” guidance from EPA

Why should we judge impact using the “median” household income when they are not the most sensitive “receptors”?

Where does 1% of median income come from as a threshold? Sounds *de minimus* but may not be, especially for low income families.

What is an acceptable increase in utility rates (10%?)?

Shall take into consideration the downstream water quality standards

How far downstream?

What does “consideration” mean?

What if the best attainable condition does not ensure downstream standards?

What if downstream is a different political jurisdiction(s)?

What about pollutant/pollution sources downstream?

At a minimum

TMDLs and WQBELs always go beyond the minimum

No technology-based controls for pollutants of predominant concern

Marginal cost-marginal benefit (knee of the curve), B/C ratio

Reasonable and cost-effective BMPs

Structured scientific assessment

Should there be tiers of rigor?

How robust does the model need to be? More than the model for the TMDL or NPDES permit?

Is enough ever enough?

Optimistic outlook

UAAs will not fade into the night because of TMDL and Wet Weather programs

EPA, DEQs, etc are developing guidance; WERF/AMSA are developing guidance/handbook etc